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No. 84-767

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's agreement to accept petitioner's plea proposal only if both he and his co-defendants entered a plea of guilty was improperly coercive.

2. Whether the district court properly denied petitioner's motion to withdraw his plea of guilty under Fed. R. Crim. P. 32(d).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-1 to 1-15) is reported at 740 F.2d 339.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 2-1). The petition for a writ of certiorari was filed on November 9, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement in the United States District Court for the Northern District of Texas, petitioner and co-defendants Donald T. McDevitt and Keith D. Kantor were convicted of conspiracy to defraud the United States by impeding the functions of the Internal Revenue

Service, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years' imprisonment and a $2,500 fine.[1] The court of appeals affirmed.

1. The government's factual resume, in which petitioner concurred (Nov. 1 Tr. 46; Oct. 3 Tr. 44-45, 48-51; Pet. App. 1-2 n.1, 1-3), showed that between November 1978 and July 1982 petitioner and his co-defendants, each of whom was a licensed life insurance agent, conducted schemes to defraud life insurance companies of commissions on insurance policies and to sell false income tax deductions to various business enterprises. The defendants obtained insurance agency contracts with life insurance companies and formed dummy corporations for the purpose of appointing corporate officers who would require large life insurance policies. Using a West Indian bank they had acquired, the defendants transmitted to the insurance carriers false loan commitment letters, promissory notes, and financial statements in order to induce the companies to write the insurance policies and pay them agency commissions. Finally, they falsely represented that they were collecting premiums for the policies when, in fact, they were using the commissions paid to them by the insurers to pay for the insurance.

The tax fraud conspiracy that formed the basis of the guilty pleas evolved during the course of the life insurance commission scheme as a means of avoiding the payment of federal income tax on the fraudulently acquired insurance commissions (Oct. 3 Tr. 7). The fraud was then marketed by petitioner and the co-defendants to third parties as a means of evading tax liability. Under the scheme, the three would enter business consultation contracts with various individuals through a Bahamian corporation. No actual business

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[1]McDevitt was sentenced to three years' imprisonment and fined $2,500. Kantor was sentenced to three years' imprisonment, with all but six months suspended, and fined $2,500.

consultation, however, was ever performed by the defendants or by anyone else. The "consultees" would advance the defendants a "consultation fee" in the amount of their taxable income. The defendants retained ten per cent of the fee as their profit — which they divided among themselves —and returned the remaining 90% in the form of an ostensible loan from their West Indian bank or another entity. The transaction thus made it appear that the "consultees" had legitimate business income tax deductions to offset their taxable incomes. To advance the scheme, petitioner and the co-defendants all met with potential customers, outlined the plan, and induced some of them to participate (*id.* at 37-41).

2. On July 2, 1982, petitioner and the co-defendants were indicted on the tax fraud conspiracy count as well as on five counts of mail fraud, in violation of 18 U.S.C. 1341. Prior to his arraignment, petitioner was represented by Robert S. Travis of Fort Worth, Texas. However, when Travis learned that one of the insurance companies that the defendants had allegedly defrauded was also a client of his firm, he withdrew. See July 16 Tr. 8-9; Nov. 1 Tr. 18-19. Accordingly, petitioner appeared at his arraignment without counsel, whereupon the court entered a plea of not guilty on his behalf and directed him to secure a new attorney (July 16 Tr. 18, 20).

During a proceeding on July 23, petitioner informed the court that he had retained Charles Burton and Roy Minton to represent him. On July 30, the two attorneys, who were also representing co-defendant McDevitt (himself an attorney), entered their appearances. At the outset of a hearing on that date, the court inquired concerning a possible conflict of interest resulting from the dual representation of petitioner and McDevitt. Minton assured the court that he could discern no conflict of interest but that, if any conflict existed, his clients would waive it. Both petitioner and

McDevitt concurred in this representation. Pet. App. 1-3; July 30 Tr. 6-7.

After the court granted several defense motions for continuances, trial was scheduled to commence on Monday, October 3, 1983. It was expected to last two or three weeks. However, during the weekend of October 1 the prosecutor and counsel for the three defendants negotiated a plea agreement and agreed upon a factual resume to support the anticipated plea. Accordingly, on the morning the trial was to begin, counsel for the defendants announced that their clients had agreed to enter pleas of guilty to the tax fraud conspiracy count in exchange for dismissal of the mail fraud counts (Oct. 3 Tr. 2). The government's obligation to each defendant under the agreement was conditioned upon entry of pleas of guilty by all three defendants on the conspiracy count, a condition petitioner terms an "all or none" requirement.

During an inquiry conducted pursuant to Fed. R. Crim. P. 11, petitioner stated that he had entered the plea of guilty voluntarily and without coercion or pressure; that he fully understood the elements of the offense to which he entered the plea and the nature of the charges against him; and that he "did * * * whatever [he was] charged with doing." Accordingly, the district court found that the plea was "knowingly and understandingly made" and entered a finding of guilty. Oct. 3 Tr. 25-26, 43-45.

On October 5, petitioner visited Travis, his former attorney, for advice. During the meeting, Travis told him that the fact that he participated in the scheme on the basis of "what [co-defendant] McDevitt told him to do * * * would be a point in his favor" (Oct. 28 Tr. 25) and referred petitioner to his present attorney, Emmitt Colvin, for further advice.

On October 24, petitioner filed a motion to substitute Colvin for Burton as his attorney, and on October 25 — 22 days after entry of the guilty plea — he filed a motion to withdraw his plea of guilty. The withdrawal motion was predicated on two grounds: that he had a viable defense of which he had not been previously aware, and that the guilty plea was coerced because the plea agreement was contingent upon entry of pleas of guilty by all three co-defendants (Pet. App. 1-4). To support the motion, petitioner executed an affidavit stating that "[a]t all times during the indictment period I was advised by [co-defendant] Don McDevitt [an attorney] and other attorneys that the transactions in which I was involved and upon which I acted were legal." He also averred that, although Burton had questioned him concerning reliance upon such advice, Burton failed to inform him that advice of counsel could constitute a defense to the charges in question. See Affidavit in Support of Petitioner's Motion to Withdraw Plea of Guilty.

On November 1, after granting petitioner's motion to substitute counsel, the district court conducted a hearing on the motion to withdraw the guilty plea. During the hearing, Burton denied that appellant ever suggested to him that, in commiting the offenses charged, "he was seeking advice from Mr. McDevitt in an attorney/client relationship or that he was acting on advice from Mr. McDevitt as an attorney." He explained that in none of his extensive discussions with petitioner and the co-defendants "did it appear to me or occur to me nor did [petitioner] advance the theory or suggest to me that he was seeking advice from Mr. McDevitt as an attorney." Nov. 1 Tr. 35. Although Burton conducted extensive discovery over a 15 month period, he "never saw in this case or the facts of the case an instance where advice of counsel would be a defense" (*id.* at 38). Elaborating further, Burton stated that his perception of the facts was that, throughout the scheme, petitioner and

McDevitt were acting as joint venturers. He therefore "did not view [petitioner] and Mr. McDevitt as having an attorney/client relationship, insofar as the events for which they were indicted and tried" were concerned (*id.* at 41; see *id.* at 50). Addressing petitioner's claim that his plea of guilty was the result of coercion induced by the "all or none" plea agreement, Burton stated that neither he nor anyone else to his knowledge exerted any pressure or coercion of any kind to induce appellant to plead guilty (*id.* at 43).

After reviewing petitioner's responses to questions asked during the plea inquiry under Fed. R. Crim. P. 11, the district judge stated that he had observed petitioner's demeanor during that inquiry and that "[t]here was just no question in the Court's mind but what everyone thoroughly and clearly understood what was being said, what was done in this case as I accepted the plea of guilty" (Nov. 1 Tr. 72). The judge also observed that "[l]awyers have different strategies. Certainly this court can't let different lawyers with different strategies come in to change a plea just because of the strategy" (Pet. Supp. App. 1; Nov. 1 Tr. 73). Reviewing applicable precedents and "the facts of this case," the district court concluded (Pet. Supp. App. 3; Nov. 1 Tr. 76):

> if this defendant is permitted to withdraw his plea of guilty under these set of facts, I dare say that there isn't a plea of guilty that was ever accepted in the courts that couldn't * * * be withdrawn.

The motion was denied.

3. Applying a multi-factor analysis for determining whether withdrawal of the plea prior to sentencing was based upon "any fair and just reason" (Pet. App. 1-5 to 1-6; see Fed. R. Crim. P. 32(d)), the court of appeals held that the district court did not err in denying petitioner's motion to withdraw his guilty plea. In particular, the court found

that the motion was not promptly filed because 22 days elapsed after the plea of guilty was entered, a lapse suggesting that the motion was the result of a change of tactics rather than a bona fide belief that the guilty plea was not knowingly entered (Pet. App. 1-7). The court of appeals also observed that permitting withdrawal of the plea and rescheduling the case for trial would have substantially inconvenienced the court by disrupting its docket. In addition, it noted that, throughout the proceedings, petitioner "had close assistance of highly effective counsel" (*ibid.*).[2] Finally, the court held that petitioner had no valid excuse for not presenting earlier the defense that formed the basis for the withdrawal motion. Addressing petitioner's contention that he did not proffer the defense earlier because his trial attorney did not inform him that such a defense was possible, it stated that "[t]he evidence overwhelmingly indicates * * * that the reason that his attorney did not advise him of such a defense is that such a defense was beyond the realm of a legally cognizable defense under the facts of this case" (*id.* at 1-9 to 1-10).

The court of appeals also rejected petitioner's contention that his plea of guilty was not entered knowingly and intelligently because of the conditions of the "all or none" plea agreement. The court observed that, during the guilty plea inquiry, petitioner stated that he understood the charges against him and the elements of the offense and admitted commission of the acts forming the basis of the charge. Noting the district court's observation during the hearing on the motion to withdraw the plea of guilty that petitioner thoroughly understood the proceedings, the court below concluded that petitioner "entered a knowing and voluntary plea agreement" (Pet. App. 1-8; see also *id.* at 1-15).

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[2]The district court had previously observed that petitioner's trial counsel were two of the most experienced criminal defense attorneys in the State of Texas (Pet. App. 1-7).

Finally, the court rejected petitioner's argument that the "all or none" requirement of the agreement placed his attorney, who was also representing McDevitt, in a position of conflict of interest.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that a guilty plea agreement in a multi-defendant case, in which the receipt of benefits by any single defendant is conditioned upon entry of a plea by each of the co-defendants, is inherently coercive and renders the plea involuntary. This claim is plainly without merit.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), the Court observed that plea bargains involving adverse or lenient treatment for some person other than the accused "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." The courts of appeals that have addressed the issue since *Bordenkircher* have uniformly held that plea bargain agreements that require entry of a plea by each of several co-defendants as a condition for leniency toward any of them or that otherwise confer benefits on third persons are not coercive per se or inherently involuntary. See *United States* v. *Castello*, 724 F.2d 813, 814-815 (9th Cir. 1984), cert. denied, No. 83-6475 (June 18, 1984); *United States* v. *Usher*, 703 F.2d 956, 958 (6th Cir. 1983); *Harman* v. *Mohn*, 683 F.2d 834, 837-838 (4th Cir. 1982); see also *United States* v. *Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979); *United States* v. *Tursi*, 576 F.2d 396, 398 (1st Cir. 1978). As

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[3]The court below also rejected petitioner's claims that his trial counsel provided ineffective assistance due to failure to explore and develop the defense; that the district court failed to comply with the requirements of Fed. R. Crim. P. 11(f) in accepting his guilty plea; and that the plea was not entered voluntarily, knowingly, and intelligently. Pet. App. 1-11 to 1-15.

the court explained in *Harman*, 683 F.2d at 837, "[there is] no intrinsic constitutional infirmity in broadening plea negotiations so as to permit third party beneficiaries." In such cases, the trial court need merely make a more careful examination of the voluntariness of the plea. See *United States* v. *Castello*, 724 F.2d at 815; *Harman* v. *Mohn*, 683 F.2d at 837 (collecting cases); see also *United States* v. *Usher*, 703 F.2d at 958.[4]

While a conditional plea agreement of this nature might in some circumstances give rise to the claim that one of several co-defendants coerced another into entry of a plea of guilty in order to obtain its benefits, such a claim should be tested on the facts of the individual case. Here, the district court expressly inquired whether petitioner's plea was voluntary and whether anyone had forced or threatened him to enter the plea. Petitioner expressly rejected such possibilities and acknowledged that he was entering the plea solely because he was guilty. Oct. 3 Tr. 25. Subsequently, during the hearing on the motion to withdraw the plea, petitioner's trial attorney testified without contradiction that neither he nor anyone else exerted any pressure on petitioner to induce him to plead guilty (Nov. 1 Tr. 43). The court below therefore properly concluded that, despite the "all or none" condition of the plea bargain, petitioner's plea was entirely voluntary (Pet. App. 1-8).

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[4]Petitioner's suggestion (Pet. 9) that it would be "quick, clean, simple and painless" to "outlaw" the practice of "all or none" plea agreements is obviously mistaken. In cases in which the evidence against each defendant is largely the same, the government would often gain little or nothing from a bargain that eliminates the need for trial of one, but not all, defendants. A bargain that eliminates the advantage to one side is a bargain that is not likely to be struck. "Outlawing" the practice would thus work to the disadvantage not just of the government and the public, but also of defendants who desire to reach a plea agreement in such situations.

Nor is there any substance to petitioner's argument that where several defendants are represented by the same attorney, "all or none" plea bargains are "inherently coercive and necessarily create conflicts of interest" (Pet. 8). Although in cases where the culpability of one of several co-defendants is greater than the others or one defendant has a viable defense that is not available to the others, such a plea offer might constitute an incentive to sacrifice the interests of one client to obtain the benefits for the others, where each defendant uniformly stands to gain from participation in the agreement no conflict of interest exists. Indeed, a presumption of a conflict in such cases "would preclude multiple representation even in cases where '[a] common defense * * * gives strength against a common attack.' " *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), quoting *Glasser* v. *United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J. dissenting).[5]

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[5]"[A]bsent special circumstances * * * trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of a conflict as may exist." *Cuyler* v. *Sullivan*, 446 U.S. at 346. Moreover, Fed. R. Crim. P. 44(c) requires trial courts to inquire as to the propriety of joint representation whenever two or more defendants charged with the same offense and joined for trial are represented by a single retained counsel. Such inquiries will further insulate jointly represented defendants from the possibility that their interests will be compromised by the negotiation of all or none plea agreements. As the court below observed, "the trial court repeatedly and effectively pursued the po[s]sibility of conflict of interest" both during the Rule 44(b) inquiry and during the subsequent hearing to set aside the plea of guilty. On the latter occasion, counsel represented to the court that he was certain no conflict of interest existed even in the face of the plea agreement (Pet. App. 1-13; Nov. 1 Tr. 53-54). Because " '[a]n attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial' " (*Cuyler*, 446 U.S. at 347), the courts below properly accepted the joint representation.

In this case there is no reason to believe that the "all or none" agreement, which petitioner's counsel negotiated, compromised petitioner's interests in the least. The parties' factual resume demonstrates that petitioner and McDevitt were equally culpable in conducting the fictitious tax shelter fraud scheme. As the district court noted (Pet. Supp. App. 2; Nov. 1 Tr. 76), petitioner — no less than his co-defendant — "got great benefit from this plea agreement." The maximum period of confinement was reduced from 30 to 5 years, and the possible fines were also reduced. *Ibid.* And in any event, petitioner expressly and knowingly waived any claim of conflict of interest from the joint representation (Pet. App. 1-3; July 30 Tr. 6-7).

The disposition by the courts below of petitioner's argument was therefore reasonable in light of the facts of the case as well as consistent with the standards followed by other courts of appeals.

2. Petitioner also claims (Pet. 10-11) that, in rejecting his motion to withdraw his plea, the district court improperly assessed the merits of a defense based upon an advice of counsel instruction, and that the court of appeals committed the same error in holding that no fair and just reason had been proffered to justify withdrawal of the plea. This claim is without merit.

a. Petitioner's argument is based on a mischaracterization of the opinion of the court below. The court of appeals did not uphold the district court's denial of petitioner's motion to withdraw his guilty plea on the ground that his proffered defense was meritless. Rather, the court considered eight well-established factors — from which the merit of the proffered defense is conspicuously absent — in reaching its decision. See Pet. App. 1-5 to 1-6. The factors, derived from various court of appeals decisions (see *id.* at 1-5 to 1-6 nn.3-10), are as follows (*id.* at 1-5 to 1-6 (footnotes omitted)):

> (1) whether or not the defendant has asserted his innocence; (2) whether or not the government would suffer prejudice if the withdrawal motion were granted; (3) whether or not the defendant has delayed in filing his withdrawal motion; (4) whether or not the withdrawal would substantially inconvenience the court; (5) whether or not close assistance of counsel was available; (6) whether or not the original plea was knowing and voluntary; and (7) whether or not the withdrawal would waste judicial resources; and [(8)], as applicable, the reason why defenses advanced later were not proffered at the time of the original pleading, or the reasons why a defendant delayed in making his withdrawal motion.

The court of appeals found that petitioner satisfied the first two factors, but that the remaining factors militated strongly against permitting him to withdraw his plea. The judgment was not based on any single factor or factors, but on "the totality of the circumstances and factors involved in this case" (Pet. App. 1-6).

This case therefore does not present the question whether Fed. R. Crim. P. 32(d) permits "an examination of the merits of a defense that is proferred as the 'fair and just' reason for withdrawal of a plea of guilty" (Pet. i). Petitioner does not challenge the multi-factor analysis actually applied by the court of appeals. There is, therefore, no reason for further review.

b. In the course of discussing the last factor quoted above — the reason why petitioner did not earlier proffer the defense now urged as a basis for withdrawal of the plea — the court of appeals rejected petitioner's claim that he did not do so "because his attorney did not inform him that such a defense was possible" (Pet. App. 1-9). The court concluded (*id.* at 1-9 to 1-10) that the "evidence overwhelmingly indicates that the reason that his attorney did not

advise him of such a defense is that such a defense was beyond the realm of a legally cognizable defense under the facts of this case." This conclusion forms the apparent basis for petitioner's claim that the court of appeals impermissibly examined the merits of his proffered defense. See Pet. 10.

Even analyzing this conclusion as if it constituted an independent ground for rejecting petitioner's withdrawal motion — rather than being a factual component of the court's conclusion that petitioner had no valid reason for not presenting any viable defenses on a timely basis — it accords with settled principles of law. Petitioner correctly points out (Pet. 10), citing, inter alia, *United States* v. *Schubert*, 728 F.2d 1364, 1366 (11th Cir. 1984), *Gearhart* v. *United States*, 272 F.2d 499, 502 (D.C. Cir. 1959), and *Bergen* v. *United States*, 145 F.2d 181 (8th Cir. 1944), that a court may not ordinarily inquire into the merits of a newly-discovered defense proffered as a basis for a motion to withdraw from a plea agreement under Fed. R. Crim. P. 32(d). However, it is generally held that when the factual basis for the proffered defense upon which the motion is based fails to establish a defense as a matter of law, the motion may properly be denied on that ground. As the court explained in *United States* v. *Barker*, 514 F.2d 208, 220 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975), "[i]f the movant's factual contentions, when accepted as true, make out no legally cognizable defense to the charges, he has not effectively denied his culpability, and his withdrawal motion need not be granted". See *United States* v. *Schubert*, 728 F.2d at 1366-1367 (distinguishing *Barker*).

Here, the courts below properly concluded that, even if taken as true, petitioner's averment that his criminal activities were based upon McDevitt's legal advice to him would not, as a matter of law, have entitled him to a good faith instruction based upon reliance on the advice of counsel. In

order for such an instruction to be available to a defendant there must be at least some evidence that the attorney advised the defendant within the context of a bona fide attorney-client relationship. Where the uncontroverted evidence shows that the lawyer furnishing the advice is a partner in the criminal enterprise "taking [on] the profits as such, and not a lawyer who had no interest save to give sound advice for a reasonable fee," the advice of counsel defense is unavailable. *Shushan* v. *United States*, 117 F.2d 110, 118 (5th Cir.), cert. denied, 313 U.S. 574 (1941); see also *United States* v. *Schewfelt*, 455 F.2d 836, 839 (9th Cir.), cert. denied, 404 U.S. 944 (1972) (advice of counsel defense unavailable when the attorney in question merely serves to implement the criminal scheme).

In this case the factual resume, which petitioner admitted as true upon entering his plea of guilty, showed that McDevitt was deeply involved in every aspect of the sham tax shelter operation. He signed fictitious consultation contracts on behalf of a dummy corporation, actively promoted the scheme by conducting meetings with potential customers, and shared in the profits of the scheme (Oct. 3 Tr. 38-39, 41-42; Pet. App. 1-11). On these facts there was simply no legally cognizable defense to the charge based upon reliance on the advice of counsel. The court of appeals' recognition of this does not constitute error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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